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No. 94-947

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

PETER WINKLER
JOHN EMAD ARBAB
Attorneys
National Labor Relations Board
Washington, D.C. 20570

DREW S. DAYS, III
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following was a party to the proceedings in the court below: International Brotherhood of Electrical Workers, Local 292.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board, Pet. App. 12a-42a, and the decision and recommended order of the administrative law judge, Pet. App. 43a-135a, are reported at 309 N.L.R.B. 1250.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1994. The petition for a writ of certiorari was filed on November 23, 1994, and granted on January 23,

1995. J.A. 282. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

1. Respondent Town & Country Electric, Inc., is a large nonunion electrical contractor based in Wisconsin. In early September 1989, Town & Country was awarded a contract to perform electrical renovation work at a paper mill in International Falls, Minnesota. Pet. App. 2a. After being awarded the contract, Town & Country learned that Minnesota requires an electrical contractor

to employ at least one electrician licensed by that State for every two unlicensed electricians working at a job site. At the time, none of Town & Country's electricians had a Minnesota license. *Ibid.*

To help it recruit Minnesota-licensed electricians, Town & Country retained respondent Ameristaff Personnel Contractors, Ltd., an employment agency. Pet. App. 2a. Town & Country instructed Ameristaff that applicants had to be able to work in a nonunion shop. *Id.* at 16a. On September 3, 1989, Ameristaff advertised for "licensed journeymen electricians" in a Minneapolis newspaper. Applicants responding to the advertisements were asked, *inter alia*, whether they preferred to work union or nonunion. *Ibid.* Ameristaff arranged for interviews with seven applicants to be held on September 7, 1989, at a Minneapolis hotel. *Id.* at 2a-3a, 16a.

Members of the International Brotherhood of Electrical Workers, Locals 292 and 343 (the Union), learned of the job. The Union encouraged its unemployed members to apply, with the understanding that those members, if hired, would attempt to organize the job site. The Union had established a fund to reimburse members for wage, travel, and health-benefit differentials incurred on nonunion jobs. Pet. App. 16a.

On September 7, 1989, officials of respondents appeared at the hotel to interview applicants. Only one of the seven applicants with a scheduled interview was present. Pet. App. 3a. Also present for interviews were approximately one dozen members of the Union, two of whom were full-time paid union officials, and the rest of whom were unemployed electricians. *Id.* at 3a, 17a. Respondents' officials expressed pleasure with the size of the turnout (*id.* at 65a), and gave the nonscheduled applicants application forms to complete. The completed applications of the union applicants showed that they were

licensed electricians who were both qualified and available for work. *Id.* at 53a-54a, 59a-60a. Respondents' officials interviewed the nonunion applicant and a union member who had no appointment but who stated that he had to leave soon to care for his children. Neither was hired. *Id.* at 3a, 17a.

Steven Buelow, Ameristaff's president, then advised the remaining applicants, all of whom were union members, that the job was nonunion. The union members stated that they were interested in any job available. Pet. App. 18a. Buelow then advised Ron Sager, Town & Country's manager of human resources, that he had concluded that the remaining applicants were all "union." *Id.* at 3a, 18a; J.A. 103. Sager thereupon cancelled further interviews. Pet App. 3a, 18a.

One of the unemployed union members, Malcolm Hansen, protested that he had called Ameristaff that morning and had been told to report for an interview at the hotel, and that he would refuse to leave until interviewed. Pet. App. 3a, 18a-19a. Sager at first threatened to have the union members forcibly removed. *Id.* at 19a. Sager then stated that he would check on Hansen's situation and honor the commitment to Hansen if Hansen's account was verified. *Ibid.* Upon obtaining verification of that account, Sager interviewed Hansen, and hired him. *Id.* at 3a-4a, 19a. Sager advised the remaining union members that he would not interview them, despite Town & Country's stated need for more than one licensed electrician, and despite the fact that only five days remained before work on the project was to commence. *Id.* at 19a, 56a.

Hansen's job began on September 12, 1989. The following day, during a recess, Hansen announced that he was seeking to organize employees for the Union. Pet. App. 4a, 91a. Town & Country's project superintendent, who was present, immediately telephoned his superiors. When he returned from the call, he told Hansen that Hansen would be fired if he continued to talk about the Union. *Id.* at 91a-92a, 109a n.73, 121a, 128a (¶ 6). The following day, at the noon recess, Hansen sought to convince the work crew of the merits of union organization. *Id.* at 102a. Later that day, Hansen was discharged. *Id.* at 4a, 100a, 106a-107a.[1] After the discharge, the Union reimbursed Hansen for wage, benefit and travel differentials, and materials. *Id.* at 9a & n.2.

2. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that respondents violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to consider the union members for employment because of their union affiliation, and by terminating Hansen because of his union activities.[2] Respondents contended

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[1] The company's stated reason for the discharge was that it had terminated its contract with Ameristaff, having learned that, under Minnesota law, an electrical contractor could not use temporary employees such as Hansen from an employment agency; rather, all employees had to be directly employed by the contractor. Town & Country, however, rejected Hansen's request that the company hire him directly. Pet. App. 4a, 107a.

[2] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act grants employees the right, *inter alia*, "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of

that they had acted for nondiscriminatory reasons, and that, in any event, neither the applicants nor Hansen were bona fide "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). Pet. App. 20a-21a.

a. The administrative law judge (ALJ) found that respondents had violated Section 8(a)(1) and (3) of the Act. He found that respondents had refused to consider the job applicants for employment because of their presumed union affiliation. Pet. App. 56a-69a. He further found that Town & Country had terminated Hansen's employment because of his attempts to unionize the other electricians. *Id.* at 109a-110a. The ALJ rejected Town & Country's claim that Hansen had been fired for poor performance, deeming that claim a "thinly veiled attempt to mislead as to the true reasons" for the discharge, and finding the claim to be "lacking in credible support." *Id.* at 121a.

The ALJ also rejected respondents' claim that the union members, by virtue of the fact that they stood to be compensated by the Union for organizing respondent Town & Country's work force, were not "employees" under the Act. In *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989), the ALJ noted, the Board had held that paid union organizers who apply for or in fact work for hire for an employer are "employees" within the meaning of Section 2(3) of the Act. Accordingly, the ALJ found that the two union officials and the other union members who had applied for employment were protected by the Act against discrimination based on their union activity or affiliation. Pet. App. 53a n.13. Hansen's goal of organ-

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employment * * * to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

izing the other electricians did not deprive him of the Act's protection, the ALJ held. Rather, Hansen was "a rank-and-file union member," and "was dependent financially on employment as a journeyman electrician in the construction industry." *Id.* at 107a n.69. Thus, "Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection." *Ibid.*

b. The Board adopted the ALJ's findings of fact. Pet. App. 13a & n.3. In agreement with the ALJ, the Board concluded that respondents, by refusing to interview the union members and by discharging Hansen on account of their union affiliation, had violated Section 8(a)(1) and (3) of the Act. *Id.* at 12a-42a.

The Board also reconsidered and reaffirmed its position in *Zachry* that paid union organizers are "employees" within the meaning of Section 2(3) of the Act and are therefore protected against discriminatory refusals to hire and discriminatory termination. Pet. App. 32a-33a.[3] The Board noted that applicants for employment have been held to be "employees" within the meaning of Section 2(3) ever since *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). Pet. App. 22a. The fact that an applicant is a paid union organizer seeking to unionize an employer's work force does not change that result, the Board reasoned. Section 2(3) defines "employee" as "any employee," and paid union organizers do not fall within any of the Act's specific exclusions. *Id.* at 23a-24a. Moreover, both the legislative history and this Court's interpretations of the Act support a broad definition of the statutory term "employee." *Id.* at 24a-29a. For a paid union organizer simultaneously to be an

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[3] The Board reached the same result in a companion case. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992).

"employee" of another entity also comports with the common-law principles of agency to which this Court has looked to define the term "employee" in cases in which it was left undefined by statute, the Board concluded. Under the common law, "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id.* at 28a (quoting 1 Restatement (Second) of Agency § 226, at 498 (1958)). Finally, protecting paid union organizers as "employees" furthers the Act's goal of promoting the right to organize, while leaving intact management's legitimate rights to direct and control employees under its supervision and to limit union solicitation to nonwork time. Pet. App. 33a-39a.

As a remedy, the Board adopted the ALJ's recommended order that Town & Country, *inter alia*, offer employment to Hansen and the union members who had been denied interviews, and make the union members whole for any losses suffered as a result of Town & Country's discrimination. Pet. App. 40a, 131a-133a.[4]

3. The court of appeals reversed. Pet. App. 1a-11a. It accepted respondents' contention that a paid union organizer is not an "employee" within the meaning of Section 2(3) of the Act, and therefore denied enforcement of the Board's order. *Id.* at 7a-9a.[5] The court noted that

[4] The Board left to compliance proceedings the determination of how many electricians Town & Country would have hired absent its antiunion discrimination, and thus how many of the ten applicants are actually entitled to a remedy. Pet. App. 130a.

[5] The court of appeals found it unnecessary to consider respondents' remaining contentions that the Board "improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union," and that it "failed to follow precedent that permits employers to prohibit solicitation during work time." Pet. App. 11a.

the circuits are split on whether paid union organizers are employees under the Act, with the District of Columbia, Second, and Third Circuits holding that they are, and the Fourth and Sixth Circuits holding that they are not. *Id.* at 5a-7a; see *Willmar Electric Service, Inc.* v. *NLRB*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); *NLRB* v. *Henlopen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979); *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); see also *Escada (USA) Inc.* v. *NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).

The court of appeals found the Fourth Circuit's reasoning in *Zachry* to be persuasive. Pet. App. 7a. The court stated that it found the definition of "employee" in the Act to be of "little help." *Ibid.* Instead, the court looked to the common law for guidance. It noted that an individual may be "the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other." *Id.* at 8a (citing 1 Restatement, *supra*, § 226, at 498). Ordinarily, a job applicant may be simultaneously loyal to his union and to his nonunion employer, the court stated. Pet. App. 8a. But the Union's two full-time organizers "were not typical applicants," the court stated, because they already had a job and "wanted to enter Town & Country's work force not for financial gain, but to organize its workers." *Ibid.* And "[w]hen a union official applies for a position only to further the union's interests, * * * an inherent conflict of interest exists," the court reasoned, for "the union official will follow the mandates of the union, not his new employer." *Id.* at 8a-9a. For example,

"[i]f the union asks him to quit working for his second employer, he will do so." *Id.* at 9a. Further, the court stated, a full-time union official "has a reduced incentive to be a good employee for his second employer," because, if terminated, "he simply returns to his full-time union job." *Ibid.*

The court of appeals further held that the unemployed electricians who belonged to the Union (including Hansen) were also not "employees" within the meaning of Section 2(3) of the Act, because they "were also under [the Union's] control." Pet. App. 9a. The court based this conclusion on three factors. First, the unemployed union members had been encouraged by the Union to apply. *Ibid.* Second, the Union had committed to paying the difference between their salaries and union-scale wages. *Ibid.* Third, the union members were subject to the Union's "job salting organizing resolution," which provided that members could work for nonunion employers "only if they work for organizational purposes," and that union members were to leave the nonunion job upon notification by the Union. *Id.* at 9a-10a. That last provision, the court stated, was "controlling," for a union's "control over a putative employee's job tenure * * * is inimical to, and inconsistent with, the employer-employee relationship." *Id.* at 10a.

SUMMARY OF ARGUMENT

The Board has long held that a worker who is a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3). In light of the Board's role as the agency primarily responsible for developing and applying national labor policy, that interpretation warrants deference and should be upheld if it is "rational and consistent with the Act." *NLRB* v. *Curtin Matheson*

Scientific, Inc., 494 U.S. 775, 786-787 (1990). The Board's interpretation in this case is not only consistent with, but is strongly supported by, the text of the Act.

As this Court has recognized, the breadth of Section 2(3)'s definition is "striking." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984). Section 2(3) provides that "[t]he term 'employee' shall include *any* employee," subject only to a list of specific exclusions for categories of workers. 29 U.S.C. 152(3) (emphasis added). Paid union organizers do not fit within any of those excluded groups, and Section 7 of the Act, 29 U.S.C. 157, refutes any claim that an otherwise-covered worker forfeits his status as an "employee" by engaging in organizing activities: it provides, *inter alia*, that "[*e*]*mployees* shall have the right to self-organization" (emphasis added). Under the principle of *expressio unius est exclusio alterius*, the absence in Section 2(3) of any exclusion for employees who are paid by a union for such organizing establishes that paid union organizers are "employees." The legislative history of the Act supports that interpretation, as does a provision of the closely related Labor Management Relations Act of 1947, which recognizes that a worker can simultaneously be an employee of both a union and an employer.

The court of appeals therefore erred in disregarding the text of the Act as providing "little help," and in defining "employee" instead solely by reference to common-law principles of agency. In any event, those principles are not offended by treating a paid union organizer as an employee. The court of appeals gave three reasons for holding that a worker's role as a paid union organizer inherently conflicts with his duties to his employer. The court of appeals feared, first, that such a worker might engage in "organizational activities at [the employer's] expense." Pet. App. 9a. However,

such activities are protected under the Act, subject to the employer's right reasonably to restrict organizing where it would impede workplace discipline or productivity. Second, the court feared that a union might direct a paid union organizer to resign abruptly. However, an employer may guard against such transience by refusing, on a union-neutral basis, to hire employees who may be unable to serve for a given duration, and by otherwise structuring terms of employment. Third, the court feared that paid union organizers will be "disloyal." But there is no basis for inferring that a paid union organizer will commit acts of disloyalty against an employer, as opposed simply to exercising his protected right to organize.

Finally, the court of appeals' interpretation of the term "employee" would produce anomalous results and defeat important policies of the Act. It would leave workers unprotected against blatant acts of antiunion discrimination. And, because many other federal statutes (such as those prohibiting discrimination on the basis of race, gender, and age) use the term "employee" with no greater guidance than that provided by the Act, the court of appeals' interpretation would threaten to deprive workers for hire who are paid union organizers of many important legal rights.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT A PAID UNION ORGANIZER APPLYING FOR OR HOLDING A JOB WITH AN EMPLOYER WHOM HE INTENDS TO ORGANIZE IS AN "EMPLOYEE" UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT

A. The Text And History Of The Act Support The Board's Longstanding Determination That A Paid Union Organizer Who Applies For Work For Hire Or Holds Such A Job Is An "Employee" Protected Against Antiunion Discrimination, And That Determination Is Entitled To Deference

1. As this Court has often explained, Congress gave the National Labor Relations Board (Board) the "primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see also *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Accordingly, where the Act does not speak directly to an issue, the Court gives "considerable deference" to the Board's interpretation, and will uphold that interpretation if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 786-787; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Deference is particularly appropriate where the interpretation in question is a "consistent,

longstanding interpretation of the NLRA by the Board." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303 (1977).

In this case, the Board has held that a "paid union organizer"—a person who applies for or holds a job with an employer that he intends to organize and who will be compensated by a union for his organizational activity—is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3). A statutory "employee" is, under Section 8(a) of the Act, 29 U.S.C. 158(a), protected against various forms of antiunion discrimination by an employer. The Board's interpretation is a longstanding and consistent one. See *Holbrook Knitwear, Inc.*, 169 N.L.R.B. 768, 771 (1967); *Sears, Roebuck & Co.*, 170 N.L.R.B. 533, 535 n.1 (1968); *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041, 1041 (1974), enforced mem., 538 F.2d 312 (2d Cir. 1975) (Table); *Oak Apparel, Inc.*, 218 N.L.R.B. 701, 701 (1975); *Anthony Forest Products Co.*, 231 N.L.R.B. 976, 977-978 (1977); *Henlopen Manufacturing Co.*, 235 N.L.R.B. 183, 184 (1978), enforcement denied on other grounds, 599 F.2d 26 (2d Cir. 1979); *Lyndale Manufacturing Corp., Inc.*, 238 N.L.R.B. 1281, 1283 n.3 (1978); *Margaret Anzalone, Inc.*, 242 N.L.R.B. 879, 888 (1979); *Columbia Engineers Int'l*, 249 N.L.R.B. 1023, 1028 n.8 (1980); *Palby Lingerie, Inc.*, 252 N.L.R.B. 176, 182 (1980); *Pilliod of Mississippi, Inc.*, 275 N.L.R.B. 799, 811 (1985); *Multimatic Products, Inc.*, 288 N.L.R.B. 1279, 1313 n.226, 1316 (1988); *H.B. Zachry Co.*, 289 N.L.R.B. 838, 839-841 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989); *Willmar Electric Service, Inc.*, 303 N.L.R.B. 245, 252 & n.24, 253 & n.37 (1991), enforced, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); *Escada (USA) Inc.*, 304 N.L.R.B. 845, 848 (1991), enforced mem., 970 F.2d 898 (3d Cir. 1992). The Board reexamined and reaffirmed that interpretation in this case (Pet. App. 22a-40a) and a companion case, *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992). The Board's interpretation is not only reasonable—in light of the text, structure, and history of the Act, it is clearly correct.

2. Section 2(3) of the Act provides that "[t]he term 'employee' shall include *any* employee," subject only to specific exclusions for agricultural laborers, domestic workers, supervisors, individuals employed by their spouses or parents or as independent contractors, and individuals employed by a person who is not an employer under the Act. 29 U.S.C. 152(3) (emphasis added). As this Court has observed, "[t]he breadth of § 2(3)'s definition is striking: The Act squarely applies to 'any employee[]' [and] [t]he only limitations are specific exemptions" in the statute. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).

In *Sure-Tan*, this Court held that undocumented aliens "plainly come within the broad statutory definition of 'employee'" because they "are not among the few groups of workers expressly exempted by Congress." 467 U.S. at 892. The Court emphasized that, "[s]ince the task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,' the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Id.* at 891 (quoting *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)). On many other occasions, this Court has recognized that, in light of the breadth of Section 2(3), deference is due to reasonable Board determinations that particular workers are

"employees." See, *e.g.*, *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) ("plain meaning" of term "employee" extends to class of individuals "who work for another for hire," and the task of determining "the contours of the term 'employee'" properly belongs to the Board, except where that determination is unreasonable); *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947) (sustaining Board holding that war-production employer's security personnel, who were required by the government to be hired as "civilian auxiliaries to the military police," were "employees"); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947) (sustaining Board holding, before addition to Section 2(3) of language excluding "any individual employed as a supervisor," that supervisors and foremen were "employees"); *NLRB* v. *Hearst Publications, Inc.*, *supra* (sustaining Board holding, before addition to Section 2(3) of language excluding "any individual having the status of an independent contractor," that newsboys who might be considered independent contractors were "employees").

Notwithstanding those admonitions, the court of appeals ruled that the text of the Act (and hence the Board's interpretation of that text) "provides little help" on the issue of whether a paid union organizer is an "employee." Pet. App. 7a. Instead, the court of appeals relied solely on its own application of common-law principles of agency to a paid union organizer. *Id.* at 7a-10a. The court of appeals' basis for taking that approach was the canon that, where a statute provides no guidance as to the meaning of the term "employee," courts are to presume that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." Pet. App. 7a-8a (quoting *Nationwide Mutual Ins. Co.* v. *Darden*, 112 S. Ct. 1344, 1348 (1992)). Based on that interpretive canon, common-law principles of agency are used, for example, to determine under the Act whether particular workers are protected "employees" or excluded "independent contractors," because the Act provides no guidance on how to distinguish between those categories. See *NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 256-260 (1968) (upholding Board's determination that the "debit agents" of an insurance company were "employees," not independent contractors).

The court of appeals fundamentally erred in disregarding the text of the Act—and the Board's interpretation of that text—on the issue of whether a paid union organizer is an "employee." There is no suggestion that the organizers in this case, or that paid organizers in general, fit within any of the statutory exclusions: As between the categories of "employee" and "independent contractor," for example, paid organizers who are workers for hire are clearly "employees." See *Pittsburgh Plate Glass*, 404 U.S. at 166. And the Act itself squarely answers the question whether the fact that an otherwise-protected worker plans to engage in union organizing renders him a non-"employee." Section 7 provides that a statutory "employee" is entitled to take such action: "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. 157 (emphasis added). See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them."). The statutory text thus makes clear that a worker for hire does not surrender his status as an "employee" by engaging in union organizing—or, in

other words, that a worker for hire who is a union organizer is an "employee."[6]

It has likewise been established since *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), that an applicant for work for hire is also an "employee," and that an employer may not refuse to hire such an applicant because the applicant intends, if hired, to engage in protected organizing activity. In *Phelps Dodge*, the Court recognized that classifying applicants as non-"employees" would effectively nullify Section 8(3) of the Act (now Section 8(a)(3)), which makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). As Justice Frankfurter, writing for the Court, put the point,

> [w]e are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of § 8(3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the [§ 8(3)] prohibition against "discrimination in regard to * * * any term or condition of employment." Contemporaneous legislative history,

[6] As we discuss at pages 25-27, *infra*, an employer may limit organizing activities to nonworking hours and may adopt reasonable rules to ensure that such activities do not interfere with discipline and production. But it is otherwise an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" the Section 7 right to organize. 29 U.S.C. 158(a)(1). See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 533 (1992).

> and, above all, the background of industrial experience, forbid such textual mutilation.

313 U.S. at 186 (footnote omitted).

Thus, the Court held, a job applicant falls within the "broad definition of 'employee' with which § 2(3) begins," and is eligible for the remedies accorded to "employees" discriminated against because of their union affiliation or activities. 313 U.S. at 192. Since *Phelps Dodge*, Congress has not amended Section 2(3) to restrict the Act's coverage of job applicants, even though it has added exclusions to that provision in response to other rulings of this Court. See *United Ins.*, 390 U.S. at 256 (noting that Congress added the exclusion for independent contractors to Section 2(3) in response to the decision in *Hearst*, *supra*, that newsboys who could be considered independent contractors were statutory "employees"); *Nationwide Mutual Ins.*, 112 S. Ct. at 1349 (same); *Florida Power & Light Co.* v. *International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 807-811 (1974) (noting that Congress added the exclusion for supervisors to Section 2(3) in response to the decision in *Packard Motor Car Co.* v. *NLRB*, *supra*, that foremen were statutory "employees").

3. The decisive issue in this case is therefore simply whether the fact that a worker for hire or a job applicant who intends to exercise the right to organize loses his status as a protected "employee" solely because a union will pay him for his organizing. Neither the text of Section 2(3) nor the history of the Act supports—indeed, they belie—such an interpretation. The Board's interpretation that a paid union organizer is an "employee" therefore should be upheld as "rational and consistent with the Act." *Curtin-Matheson*, 494 U.S. at 786-787.

Denying "employee" status to a worker solely because he receives pay for organizing a work force cannot be squared with the Act's broad definition of "employee," as the Board has recognized. Pet. App. 22a-24a. Section 2(3) covers "*any* employee" except those specifically excluded, and no exclusion exists for workers based on the relationship they have with a union or the monetary compensation they expect to receive from a union. 29 U.S.C. 152(3) (emphasis added). Moreover, one of the statutory exclusions, for supervisors, was added to address the same broad policy concerns cited by the court of appeals: that employers should not have to tolerate workers who might have divided loyalties. See *Florida Power & Light*, 417 U.S. at 810 (exclusion for supervisors was added to ensure that the employer had the loyalty of foremen in dealing with the rank and file, rather than having "the rank and file boss[] them") (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947)). Yet no similar exclusion was added for other workers with potentially divided loyalties, such as a worker who simultaneously receives pay from an employer and a union.

In light of Section 2(3)'s sweeping command that *any* employee not specifically excluded is a statutory "employee," the canon *expressio unius est exclusio alterius* (the inclusion of one thing negatively implies the exclusion of others) applies in this case with particular force. Cf. *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363 (1945). Workers for hire and job applicants who will be paid for union organizing, like undocumented aliens, are simply not "among the few groups of workers expressly exempted by Congress." *Sure-Tan*, 467 U.S. at 892.

As the Board has noted (Pet. App. 24a-26a), the legislative history of Section 2(3), although containing

no detailed analysis of its scope, also supplies no support for excluding from the Act's coverage an otherwise-covered worker who is a paid union organizer. As Section 2(3) was enacted in 1935, it was identical in its structure and wording to the present provision, although it contained fewer exemptions than it does today. See National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 450.[7] The history of that provision indicates that Congress used the term "employee" to embrace without exception the class of "workers," "wage earners" and "workmen" who comprise the work forces of "employers." See Pet. App. 25a; see also 79 Cong. Rec. 9686 (1935) (Rep. Connery, bill's floor manager, states that Act protects "every man on a pay roll"), *reprinted in* II Legislative History of the National Labor Relations Act of 1935, at 3119 (1949) [hereinafter *NLRA Leg. Hist.*]; *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 42 (1935) (Sen. Wagner, bill's sponsor, states that Act generally protects "the workers"), *reprinted in* I *NLRA Leg. Hist.* 1418.[8]

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[7] As enacted in 1935, Section 2(3) provided:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

[8] Based on its broad language and its legislative history, the Board has interpreted Section 2(3) as using the term "employee" in its "broad generic sense," and has concluded in numerous

In 1947, Congress passed the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (LMRA). Title I of the LMRA amended Section 2(3) of the Act to add exclusions for independent contractors, supervisors, and employees of an employer who is "not an employer" under the Act, see LMRA § 101, 61 Stat. 137-138; *Florida Power & Light*, 417 U.S. at 807-811, but it did not otherwise limit the broad scope of that provision. Instead, the history of the LMRA indicates, Congress continued to use the term "employee" to refer broadly to the class of people who "work[] for another for hire," or who "work for wages or salaries under direct supervision." H.R. Rep. No. 245, *supra*, at 18, *reprinted in* I Legislative History of the Labor Management Relations Act, 1947, at 309 (1974).

Indeed, in contemporaneously enacting Title III of the LMRA, 29 U.S.C. 185-187, Congress manifested an assumption that an "employee" may be not only paid but employed simultaneously by a union and an employer. Although Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits payments by an employer to an

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contexts apart from that of the paid union organizer that "the term must be interpreted to include members of the working class generally." *Briggs Manufacturing Co.*, 75 N.L.R.B. 569, 570-571 (1947); see also *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 728 & n.5 (1979). Thus, the Board has accorded "employee" status not only to employees of a particular employer, but also to employees of another employer, former employees of a particular employer, temporary and part-time employees, individuals attending school or working a second job, individuals with announced intentions to quit in the near future, and individuals secretly seeking work with a competitor. See cases cited at Pet. App. 29a n.23; see also *NLRB* v. *Copps Corp.*, 458 F.2d 1227, 1229 (7th Cir. 1972); *QIC Corp.*, 212 N.L.R.B. 63, 66-68 (1974); *International Chemical Workers Union*, 200 N.L.R.B. 341, 342-347 (1972); *L.H.C., Inc.*, 195 N.L.R.B. 989, 992 (1972).

employee of a union, Section 302(c)(1) specifically excepts from that ban monetary payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1). That provision thus recognizes that a worker can simultaneously be a paid "employee" of both a union and another employer. See *Willmar Electric Service, Inc.* v. *NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); cf. *BASF Wyandotte Corp.* v. *Local 227, Int'l Chemical Workers Union*, 791 F.2d 1046, 1048-1053 (2d Cir. 1986) (noting relationship between NLRA and LMRA). The Board's interpretation that a paid union organizer is an "employee" within the meaning of Section 2(3) is therefore rational and consistent with the text, structure, and history of the Act, and any contrary interpretation would be inconsistent with that text, structure, and history.

B. A Worker For Hire Whom A Union Pays To Organize An Employer's Work Force Does Not "Abandon" Or Act In Conflict With His Duties To The Employer

In light of the significant guidance provided by the text of the Act, the court of appeals was wrong to disregard that text (and the Board's interpretation of it) and to rely instead solely on common-law principles of agency to determine whether a paid union organizer is a statutory "employee." But, in any event, treating a paid union organizer as an "employee" does not offend those common-law principles, as the Board has recognized. Pet. App. 32a-40a.

1. The court of appeals held that a worker's status as a paid union organizer is inconsistent with the principles

that an agent "has a duty to act solely for the benefit of his principal" (see 2 Restatement (Second) of Agency § 387, at 201 (1958)), may not act on behalf of "an entity whose interests conflict with those of the principal in matters in which the agent is employed" (see 2 *id.* § 394, at 219), and may "be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other" (see 1 *id.* § 226, at 498). Pet. App. 8a. The court of appeals identified three ways in which hiring a paid union organizer purportedly conflicts with an employer's interests. None supplies a valid basis for concluding that a worker whom a union pays for organizing has "abandoned" or acted "in conflict" with his duties to his employer "master."

a. The court of appeals expressed concern, first, that a union might direct a paid union organizer to "increase his organizational activities at [the] employer's expense." Pet. App. 9a. But that concern does not justify excluding paid union organizers from the Act's coverage, for several reasons. First, the court's worry about a worker who may actively attempt to organize a work force would sweep far beyond the category of paid union organizers. If used as a basis for defining the term "employee," it would logically exclude workers who aggressively organize work forces for many other reasons: because they zealously believe in unionism, because they believe that unionizing a particular employer will increase their own wages and benefits, or because they wish to be in the good graces of union officials. It is simply of no consequence to the employer that an employee's motive to organize the workplace arises, in part, from monetary incentives.

More fundamentally, Section 7 of the Act, by giving an employee a protected right to organize, belies the court of appeals' tacit assumption that vigorous organizing is

inherently inconsistent with, or tantamount to abandoning, the employee's duties to the employer. As the Board explained, the core premise of the statute—that an employee has a right to organize—"is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer." Pet. App. 37a. Rather, "[t]he fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer." *Ibid.*[9]

Finally, recognizing as an "employee" a worker who is a paid union organizer in no way impedes the employer's ability reasonably to restrict union organizing so as to maintain discipline and productivity. Such workplace rules apply equally to paid and volunteer union organizers. See Pet. App. 34a, 38a (paid organizers are subject to same rules as other employees, and enjoy no "carte blanche in the workplace"). As this Court has explained,

> [t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.

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[9] Indeed, at common law, so long as "the purpose of serving the master's business actuates the servant to any appreciable extent," the servant's conduct "may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." 1 Restatement, *supra*, § 236 & cmt. b, at 523-524. See *Ermert* v. *Hartford Ins. Co.*, 559 So. 2d 467, 477 (La. 1990); *Leeper Hardware Co.* v. *Kirk*, 434 S.W.2d 620, 624 (Tenn. Ct. App. 1968); *Leary* v. *Department of Labor & Industries*, 140 P.2d 292, 297 (Wash. 1943).

> Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.

Republic Aviation Corp. v. *NLRB*, 324 U.S. 793, 803 n.10 (1945) (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)). An employer also remains free to fire an employee who was a paid organizer for any otherwise-lawful reason apart from the employee's union affiliation and activities. See *Edward G. Budd Manufacturing Co.* v. *NLRB*, 138 F.2d 86, 89-91 (3d Cir. 1943) ("an employer may discharge an employee for a good reason, a poor reason or no reason at all so long as" the discharge is not motivated by unlawful considerations), cert. denied, 321 U.S. 778 (1944).[10]

Employers do have a valid interest in hiring persons who are less likely than others to violate work rules. However, the Board considered that interest and found that, in its experience, there is no evidence that paid union organizers are more likely than unpaid union organizers to violate work rules. On the contrary, the Board observed, precisely because a paid union organizer applies for a nonunion job in order to give himself an opportunity to organize the work force, "engaging in conduct warranting discharge would be antithetical to

[10] Contrary to the court of appeals' suggestion (Pet. App. 9a), termination of a paid union organizer for just cause would not constitute an unfair labor practice. See *Anthony Forest Products*, 231 N.L.R.B. at 977-979; *NLRB* v. *Henlopen Manufacturing Co.*, 599 F.2d 26, 29-30 (2d Cir. 1979). But to the extent that the court of appeals viewed increased organizational activity of a union-member employee as an instance of such misconduct, it erred. The Act protects such organizational activities so long as they are confined to nonwork hours and do not otherwise interfere with discipline or production. See *Republic Aviation*, 324 U.S. at 803 n.10; *Beth Israel Hosp.*, 437 U.S. at 491-492.

th[at] objective." Pet. App. 37a; see *ibid.* ("No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct."); *id.* at 38a (in the absence of "objective evidence," the Board will refuse to "infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations").[11] The court of appeals had no basis for substituting its assumptions about the incidence of workplace infractions by particular classes of employees for the experienced judgment of the Board.[12]

[11] The Board has ruled that, in the discrete context of an ongoing strike, an employer may refuse to hire a paid union organizer. See *Sunland Construction*, 309 N.L.R.B. at 1231. An employer has a "substantial and legitimate" interest in refusing to place on the payroll a person who realistically would immediately begin encouraging other employees to withhold their services, the Board explained, and it is rational to presume that a paid member of a union "that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's efforts." *Id.* at 1231 & n.41. The basis for that ruling was not, however, that the paid union organizer is a non-"employee," but, rather, that an employer's refusal to hire a union organizer who applied for work during a strike does not violate Section 8(a)(1) and (3) of the Act. Apart from the strike situation, however, the Board has found no "inherent conflict between carrying out the duties of an employee and operating as a paid union organizer." *Id.* at 1231 n.41. Rather, "[t]he aim of inducing fellow employees to join a union is entirely consistent with being a competent employee who obeys work rules such as those time-and-place restrictions on union solicitation that are lawful" under the Act. *Ibid.*

[12] The Board properly rejected respondents' attempt to analogize a job applicant who is a paid union organizer to an outside union organizer. Pet. App. 37a-38a & n.34. An employer may ordinarily exclude an outside union organizer from his

b. The court of appeals also stated that hiring a paid union organizer could infringe upon the employer's interest in having non-transitory employees, because a union could direct the paid organizer to resign altogether. Such "control over a putative employee's job tenure," the court of appeals stated, "is inimical to, and inconsistent with, the employer-employee relationship." Pet. App. 10a; see *id.* at 9a.

The court of appeals failed to recognize, however, that an employer who has a genuine (not pretextual) interest in ensuring longterm employment may guard against employee transience by other means. Most obviously, the employer may refuse, pursuant to a union-neutral policy, to hire applicants who are likely to be temporary or transitory workers. To this end, an employer may ask an applicant whether there is any obstacle (including, for example, a pending application with another employer, a

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premises, because, as this Court has explained, the Act accords such an outsider only a derivative Section 7 right. Only where employees are otherwise physically inaccessible to union organizers does the interest of those employees in obtaining information about unionization dictate giving an outside organizer such access. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112-113 (1956); *Lechmere*, 502 U.S. at 537. By contrast to such an outside organizer, the Board explained, a worker for hire or an applicant for such a position is an "employee," and thus is statutorily protected against antiunion discrimination. Pet. App. 37a n.34. Indeed, the Board noted, a paid union organizer who is working for hire "arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in organizational activity." *Ibid*; see *Willmar Electric*, 968 F.2d at 1330 (paid union organizer's status as "employee" does not conflict with *Babcock & Wilcox* and *Lechmere*, for while the paid union organizer's employment "would give him a better perch from which to propagandize * * *, [that] would [also] be true for any union zealot who got a job with [the employer]").

family or personal commitment, or a scholastic obligation) that could inhibit the applicant from serving for a given duration. Provided that the employer applies such a durational standard on an evenhanded basis, it is free not to hire a paid union organizer applicant who fails to meet that standard. See *Willmar Electric*, 303 N.L.R.B. at 246 n.2 ("An employer may * * * lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer."); see also Pet. App. 36a n.32. Indeed, as this Court emphasized in *Phelps Dodge*, where it first held that a job applicant is an "employee" under the Act, the Act does not require employers to favor union members in hiring or infringe upon "the normal exercise of the right of the employer to select its employees." 313 U.S. at 187. Rather, the Act "is directed solely against the abuse of that right by interfering with the countervailing right of self-organization." *Ibid.* An employer may also design its compensation scheme, pension plan, and other contractual terms to encourage longevity of employment. In short, there is no need to classify a paid union organizer as a non-"employee" in order to protect an employer's legitimate interest in avoiding undue turnover within its work force.

An employer who does not take these steps and instead simply hires employees at will, however, has only itself to blame if an employee exercises his right to resign, whether impelled to leave by personal considerations, drawn by superior opportunities elsewhere, or directed to resign by a union. Indeed, at common law, employment contracts for an unspecified duration of time were

familiar, and have long been viewed as creating an "at will" relationship which either the employer or the employee may terminate at any time and for any reason. See, *e.g.*, *Gilbert* v. *Tulane Univ.*, 909 F.2d 124, 126 (5th Cir. 1990); *Broussard* v. *Caci, Inc.—Federal*, 780 F.2d 162, 163 (1st Cir. 1986); *Buian* v. *J.L. Jacobs & Co.*, 428 F.2d 531, 533 (7th Cir. 1970); see also Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 484-485 (1976). Thus, the common-law principle that a servant may not "abandon" one master for another (Pet. App. 8a (citing 1 Restatement, *supra*, § 226, at 498)) simply has no relevance where the "servant" employee does no more than exercise a right to cease employment.[18]

In its decision, the court of appeals placed "controlling" weight on the Union's "job salting organizing resolution," under which its members who applied for nonunion jobs had agreed to leave the employer "immediately upon notification." Pet. App. 10a. Reliance on that resolution was misplaced, for two reasons. First, as we have noted, an employer who genuinely wishes not to hire transitory workers is free to inquire, pursuant to a union-neutral policy, whether there is anything that

[18] The contract that respondents offered to union-organizer Hansen in this case had no specified duration. J.A. 191-192. Consistent with common law, under state law such a contract created an employment relationship that was terminable at will by either party. See *Miller* v. *CertainTeed Corp.*, 971 F.2d 167, 172 (8th Cir. 1992) ("Under Minnesota law, the normal employer-employee relationship is at will[,] [and] [a]n employee is free to leave the job at any time."); *Pine River State Bank* v. *Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (where employee is hired for an indefinite term, employment is "at-will"). Having offered such a contract, respondents may not credibly contend that they had an overriding interest in discouraging transitory employment.

could lead an applicant to cease employment prematurely. The resolution thus created no inherent conflict between the Union's demands and the employer's interests.

Second, the salting resolution did no more than *exempt* union members from a provision in the Union's constitution, which—like provisions in the constitutions or bylaws of most unions—forbade members from working for nonunion employers. Pet. App. 46a-47a, 62a; J.A. 249-256. The resolution language quoted by the court of appeals merely reserved the Union's right to rescind that exemption. The court of appeals' conclusion that the control by a union over a worker reflected in the resolution rendered the worker a non-"employee" (Pet. App. 10a) would thus cast doubt on the "employee" status of the many union members whose unions have permitted them to remain in the union while working for nonunion employers, subject to the union's right to insist that they resign such employment. See *Florida Power & Light*, 417 U.S. at 793. In any event, it is not correct that a union that reserves the right to demand that a member leave a nonunion job has absolute "control" (Pet. App. 10a) over that member's job tenure with an employer. A union will often have considerable leverage over one of its members, whether or not it pays him to organize, either because union membership makes it easier to obtain future jobs in the industry, or because the union's financial arrangements with members (*i.e.*, pension plan terms) reward continuous membership. However, faced with an ultimatum to resign from a nonunion job, the union member is always free to leave the union instead, and will decide based on his appraisal of the ramifications of the alternative courses.

c. The court of appeals also theorized that a paid union organizer who applies for work "not for financial

gain," but out of a motive to organize an employer's work force, may not be "loyal" to the employer. Pet. App. 8a-9a. The court relied on that concern in the portion of its opinion discussing the two full-time union officials who had applied to work for respondents. It did not make that point with regard to the remaining union-organizer applicants, who were unemployed. But the suggestion by the court of appeals that an applicant's or worker's motivation to engage in union organizing may be an indicator of future "disloyalty" to the employer could logically disqualify from being "employees" all workers who are avowedly pro-unionization. An employer may certainly adopt union-neutral hiring standards and disciplinary rules to ensure that employees are maximally committed to the work venture. If the employer genuinely believes that workers who hold other jobs are likely to perform at substandard levels, he may ban or restrict employee moonlighting. If the employer genuinely believes that employees who are already financially comfortable by virtue of second jobs or wealth are less driven to work hard, he may refuse to hire such persons. And the employer may punish detrimental "disloyal" conduct not inherently connected to union affiliation or organizing. See *NLRB* v. *Local Union No. 1229, Int'l Bhd. of Electrical Workers (Jefferson Standard)*, 346 U.S. 464, 472-477 (1953) (upholding discharge of employee for disparagement of employer's product); *Crystal Linen & Uniform Service, Inc.*, 274 N.L.R.B. 946, 948-949 (1985) (upholding discharge of employee for accepting employment with competitor and for steering customers to competitor). But an employer may not simply infer such disloyalty from the fact that, in taking a job, an applicant or worker is motivated actively to engage in protected organizing activities. See *Republic Aviation*, 324 U.S. at 803 n.10; *Texaco, Inc.* v. *NLRB*, 462

F.2d 812, 814 (3d Cir.) (employer may not insist that employees forgo organizational activities, or treat such activities as evidence of disloyalty), cert. denied, 409 U.S. 1008 (1972); *Abbey's Transp. Services, Inc.* v. *NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (employer may not terminate union activist who had successfully organized work force by claiming disloyalty). As we have noted, the Board has found no evidence that paid union organizers are more disruptive than other workers. Pet. App. 37a.[14]

2. The interpretation of the term "employee" adopted by the court of appeals would also yield anomalous results and frustrate central policies of the Act. Deeming a worker for hire a non-"employee" if he is to be paid for his organizing activities would remove from the statute's coverage not only job applicants, but also

[14] The Board rejected a final theory, relied upon by the Fourth Circuit in *H.B. Zachry Co* v. *NLRB*, *supra*, as to why requiring employers to treat paid union organizer applicants by the same standards as other applicants could injure employers: that such a rule could enable unions to "pack[] bargaining units with their paid functionaries." Pet. App. 36a; see *Zachry*, 886 F.2d at 75. As the Board noted, under its rules for voting eligibility in representation elections, "employee status is not synonymous with voter eligibility," and, accordingly, paid union organizers may be excluded from voting where those organizers are "temporary" employees or share no community of interests with other employees. Pet. App. 35a-36a (citing *Multimatic Products*, 288 N.L.R.B. at 1316); see *Willmar Electric*, 968 F.2d at 1330 (paid union organizer's "qualification as an 'employee' is not the same as eligibility to vote"); see also *NLRB* v. *Trump Taj Mahal Associates*, 2 F.3d 35, 38 (3d Cir. 1993) (approving exclusion from voting of employees who have no reasonable expectation of working in the same workplace in the future); *Friendly Ice Cream Corp.* v. *NLRB*, 705 F.2d 570, 581 (1st Cir. 1983) (approving exclusion from voting of temporary employees). The court of appeals in this case did not rely on that concern.

paid union organizers who have begun work, and persons who, during their employment, have taken on the role of a paid union organizer. To deem an on-the-job worker who meets every conventional test of employee status not to be an "employee" simply because a union will pay him for organizing would confound the common understanding of that term. See, *e.g.*, *Black's Law Dictionary* 525 (6th ed. 1990) ("[e]mployee" encompasses any "person in the service of another under any contract of hire * * * where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). Under the court of appeals' interpretation, a mere job applicant is an "employee" protected against antiunion discrimination, but, anomalously, a person who is actually working for pay and being treated by an employer in every material respect as an employee may not be.

The court of appeals' interpretation of the term "employee" also has the effect of leaving workers unprotected against blatant acts of antiunion discrimination, as illustrated by the treatment in this case of union member Malcolm Hansen. Hansen, an unemployed journeyman electrician, was hired to a contract of indefinite duration by respondents. There is no indication that he (or any of the other paid union organizers involved in this case) was unqualified or unwilling to perform his duties for respondents. During the two days that he worked for respondents before being fired, Hansen was a prototypical worker for hire: he worked for an hourly wage, he was subject to respondents' discipline and control in the workplace, and respondents (presumably regarding him as an employee) withheld Social Security and income tax payments from his paycheck. J.A. 201-202.

Respondents fired Hansen because he attempted during work breaks to organize other employees, as the ALJ and the Board found. Because such employee conduct is protected under Section 7 of the Act, Hansen would ordinarily have been entitled to reinstatement and backpay for the discriminatory dismissal. However, because Hansen was receiving additional pay from the union, the court of appeals held that he was not an "employee," and that respondent's antiunion conduct was therefore lawful. There is no reason to believe that Congress intended that result. On the contrary, the court of appeals' interpretation impedes Congress's "central purpose" of enabling workers to organize themselves, *Phelps Dodge*, 313 U.S. at 193, and of "encouraging and protecting the collective-bargaining process." *Sure-Tan*, 467 U.S. at 892. The ruling in this case is particularly disruptive of Congress's goal of deterring antiunion discrimination because such discrimination was the only basis for firing Hansen and for not hiring his fellow union members—the knowledge that Hansen and the applicants were paid union organizers, or were subject to the union's salting resolution, was acquired only afterwards. See Pet. App. 85a; Town & Country C.A. Reply Br. 4; compare *McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884-885 (1995) (evidence of employee's wrongdoing acquired after her termination does not defeat employer's liability for violating Age Discrimination in Employment Act of 1967).

Finally, the court of appeals' reasoning could have far-reaching adverse consequences. Other federal statutes accord protection to "employees" against various types of discrimination—on account, for example, of race, gender, and age. See, *e.g.*, Section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(f); Section 11(f) of

the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(f). Yet those statutes often supply no more precise definition of the term "employee" than does the Act. If that term were given the meaning that it was given by the court of appeals, applying common-law principles of agency, paid union organizers would be deprived of federal protection against race, gender, and age discrimination by employers, including, for example, protection against sexual harassment on the job. Moreover, the court of appeals' interpretation of the term "employee" would similarly call into question whether a worker for hire who happens to be a paid union organizer is covered by the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, or the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, among many other federal laws that relate to "employees." The very breadth of Section 2(3)'s definition of "employee" as being "any employee" strongly suggests that (except where one of Section 2(3)'s explicit exceptions applies) the term "employee" is no more constricted under the National Labor Relations Act than in its familiar, common-sense usage under these numerous other federal statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LAWRENCE G WALLACE
Deputy Solicitor General

LINDA SHER
Acting Associate General Counsel

PAUL A. ENGELMAYER
Assistant to the Solicitor General

NORTON J. COME
Deputy Associate General Counsel

PETER WINKLER
JOHN EMAD ARBAB
Attorneys
National Labor Relations Board

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